The Honorable Franklin D. Burgess

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT TACOMA

AT&T CORP. and ALASCOM, INC., d/b/a AT&T Alascom, Inc., Plaintiffs, vs. DAVID W. WALKER, DONALD J. SCHROEDER, and TERRY A. GUNSEL, Defendants.	NO. C04-5709FDB **MOTION BY TERRENCE J. DONAHUE TO (1) INTERVENE AND BE SUBSTITUTED AS REAL PARTY IN INTEREST FOR CERTAIN CAUSES OF ACTION, AND (2) FILE A COMPLAINT IN INTERVENTION, AMENDING CERTAIN CAUSES OF ACTION, ADDING CLAIMS AND DEFENDANTS** NOTE ON MOTION CALENDAR: March 17, 2006

I. INTRODUCTION

Terrence J. Donahue, the duly appointed and acting trustee for the Chapter 7 bankruptcy estate of PT Cable, Inc. (hereafter "Trustee" and "PT Cable"), and hereby moves the court for entry of an order: (1) granting the Trustee leave to intervene in this action and substitute in as the real party in interest to prosecute four causes of action asserted herein by the plaintiff, and (2) granting the Trustee leave to amend the causes of action for which the Trustee is substituted as the real party in interest and to assert new claims against both existing and new defendants.

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A. Substitution and Intervention.

The Trustee is seeking leave to substitute in as the real party in interest for four causes of action asserted by the existing plaintiffs in this action against the three existing defendants and further, to intervene in this action. The specific causes of action for which the Trustee seeks to substitute in as the real party-in-interest plaintiff are: the Third Claim for Relief (Breach of Fiduciary Duty), the Fifth Claim for Relief (Constructive Fraudulent Conveyances), the Sixth Claim for Relief (Actual Fraudulent Conveyances), and the Eighth Claim for Relief (Illegal Dividends)(hereafter collectively, "Substitution Causes of Action").

B. Amendment.

If permitted to substitute in as a real party in interest, the Trustee requests leave to: 1) amend the Substitution Causes of Action by adding factual allegations and refining applicable legal theories and, 2) add new causes of action and new parties, pursuant to a proposed Complaint in Intervention substantially in form attached to this Motion as Exhibit 1. (Depending on possible negotiations or developments, it is possible the ultimate complaint filed by the Trustee would omit some of the parties identified in Exhibit 1.) The material features of this proposed Complaint in Intervention will be described in greater detail below.

II. DISCUSSION AND ARGUMENT

A. The Trustee of the PT Cable Chapter 7 estate is the real party in interest to prosecute the third, fifth, sixth and eighth claims for relief asserted by the existing plaintiffs.

Fed. R. Civ. Proc. 17(a) provides, in pertinent part: "Every action shall be prosecuted in the

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name of the real party in interest."

The Substitution Causes of Action include claims for illegal dividend, breach of fiduciary duty, constructive fraudulent conveyance, and actual fraudulent conveyance. Causes of action to recover illegal dividends and for breach of fiduciary duty belonged to the PT Cable corporate entity prior to its Chapter 7 proceeding. They became property of the PT Cable Chapter 7 bankruptcy estate when the Chapter 7 proceeding was initiated, to be administered by the Trustee.[1]

11 U.S.C. § 541 provides, in pertinent part:

> The commencement of a case under § 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case....

The meaning of the term "property" as used in § 541(a) is very broad and includes any claim or cause of action that belonged to the debtor. *E.g.*, *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005), *quoting United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983).

Claims to recover unlawful dividends made by a Delaware corporation belong to the corporation and may be asserted on behalf of the bankruptcy estate by its representative in bankruptcy. *E.g.*, *In re Sheffield Steel Corp.*, 320 B.R. 405, 412-13 (Bankr. N.D. Okla. 2004).[2] A trustee,

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[1] PT Cable did not file its own bankruptcy case. The PT Cable Chapter 7 proceeding was initiated by the filing an involuntary bankruptcy petition by PT Cable's primary lenders under 11 U.S.C. § 303, thereby creating a bankruptcy estate under 11 U.S.C. § 541.

[2] In *Sheffield Steel*, a cause of action for recovery of unlawful dividends was asserted by the debtor in possession. In a Chapter 11 case, the debtor in possession is the representative of the bankruptcy estate with standing to pursue the estate's claims. A debtor in possession in Chapter 11 has (with limited exceptions not relevant here) the same rights and powers as a trustee. 11 U.S.C. § 1107. Thus, a cause of action becoming property of a bankruptcy estate is assertable by a trustee or a debtor in possession depending on whether a trustee has been appointed, and in either event, is to be distinguished

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as representative of the bankruptcy estate, also has standing to sue officers and directors of the debtor for breach of fiduciary duty, and other parties for aiding and abetting such breach. *E.g.*, *In re OODC, LLC,* 321 B.R. 128, 143 (Bankr. Del. 2005). There is no doubt that these Substitution Causes of Action are property of the PT Cable Chapter 7 Estate.

Furthermore, 11 U.S.C. § 544(b) expressly provides in relevant part: "[T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an [allowable] unsecured claim..." It is well recognized that this statute grants a trustee power to bring fraudulent transfer actions, for the benefit of the bankruptcy estate, that a creditor holding an allowable claim could have brought under applicable state law. *E.g.*, *In re International Loan Network, Inc.*, 160 B.R. 1, 17-19 (Bankr. D.D.C. 1993). For the foregoing reasons, it is appropriate to substitute the Trustee as the real party in interest to prosecute the Substitution Causes of Action.[3]

B. The Trustee should be allowed to intervene, not only to prosecute existing claims as the real party in interest but for all purposes, including adding parties and causes of action.

Intervention by the Trustee is authorized by Fed.R.Civ.Pro. 24(a), intervention as a matter or right, and (b), permissive intervention. Those rules provides, in pertinent part,

(a) Upon timely application anyone shall be permitted to intervene in an action:...(2) when

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from a cause of action assertable by an individual creditor of the debtor following a bankruptcy petition.

[3] By order dated October 17, 2005, this court stayed the prosecution of this action pursuant to the request of the Trustee in order to allow the Trustee time to determine whether he wished to intervene in this action. As demonstrated by this motion, the Trustee has determined that intervention is appropriate.

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> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Upon timely application anyone may be permitted to intervene in an action:...(2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Here, intervention is mandated under part (a) because the Trustee has a direct interest in the property and in the transaction which is the subject of the pending action. Indeed, if as argued above the Trustee is the real party in interest, by definition the Trustee has an interest in the transaction which is the subject of the pending case. As to the property involved, the Trustee has a right to avoid the fraudulent transfers of PT Cable's property to the Lenders and the cash that was transferred to PT Cable's owners as a dividend. The Trustee's interests in the claims arising out of the illegal dividend transaction cannot be adequately protected unless the Trustee is allowed to pursue those claims for the benefit of all creditors, not merely the benefit of the original plaintiff herein. The Trustee should not be made to rely on others to prosecute claims that belong to the PT Cable Chapter 7 bankruptcy estate– indeed others do not (absent leave of the bankruptcy court) have standing to prosecute those actions belonging to the estate.

Intervention is also permitted under part (b) because the Trustee's claims, whether prosecuted as a substituted party or otherwise, share at least some common factual questions.[4]

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[4] Although not all central factual issues, such as PT Cable's solvency, are issues common to the claims the Trustee intends to pursue and the claims that would remain with the existing plaintiffs if the Trustee is allowed to intervene, it remains clear that at least the background facts, such as the formation of the contracts with PT Cable's customers and the propriety of charging a profit for operations and maintenance, are facts that both the plaintiffs and the Trustee will want to prove, either through the introduction of evidence, collateral estoppel or other means.

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As required by Fed.R.Civ.Pro. 24(c), a proposed Complaint in Intervention, attached as "Exhibit 1" to this motion, is submitted herewith. The Trustee reserves all rights to add or delete parties prior to finalizing and filing the complaint, but only to the extent doing so is consistent with and within the scope of relief granted to the Trustee pursuant to this or another motion.

In summary, should the court permit the Trustee to substitute in as a real party in interest, the court should, quite naturally, also permit the Trustee to intervene.

C. The Trustee should be allowed to make minor amendments to the Substitution Causes of Action and add additional claims and parties.

As a natural adjunct to substituting in as the real party in interest for the Substitution Causes of Action, the Trustee wishes to amend those causes of action in a relatively minor fashion by making additional factual averments and adding additional parties not named by the original plaintiff herein. In addition, the Trustee wishes to add several new causes of action against additional defendants. The proposed Complaint in Intervention, Exhibit 1 to this motion, sets out the actual proposed amended averments, causes of action and additional defendants. By way of summary, the material new features of the Complaint in Intervention are summarized below.

1. Add additional defendants to the Eighth Claim for Relief (Illegal Dividends), including all individual directors who voted to approve the challenged dividends and/or the dividend loan transaction which made the dividends possible (adding Brooke Coburn, William E. Conway, Jr.; Richard G. Darman, and Peter H. Sorensen, all of whom were directors of PT Cable or its former parent, Neptune Pacific Holdings, Inc. (now merged into PT Cable), as well as various entity defendants alleged to have received a portion of the illegal dividends;

2. Add the same additional individual defendants to the Third Claim for Relief (Breach of Fiduciary Duty);

3. Consolidate the Fifth and Sixth Claims for Relief for constructive and actual fraudulent transfers into one cause of action for fraudulent transfers and add numerous additional parties

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as defendants to this cause of action, specifically, (a) the lenders who loaned PT Cable the money which was used virtually exclusively to pay the illegal dividend, or their successors in interest (New York Life Insurance Company, New York Life Insurance and Annuity Corporation, Jefferson-Pilot Financial Insurance Company, and Jefferson-Pilot Life Insurance Company)(collectively, "Lenders") and who received a security interest in PT Cable's assets and received numerous loan payments from PT Cable, and (b) all of the transferees of and persons benefited by the illegal dividend. This latter group of defendants consist mainly of the "Carlyle Group" affiliated entities which either directly or indirectly owned and controlled PT Cable or one or more of its directors, or benefited in some fashion from the illegal dividend.

4. Add two "aiding and abetting" causes of action, one for aiding and abetting PT Cable's and its corporate parent's directors' breach of fiduciary duty, and another for aiding and abetting the illegal dividend. The additional defendants for these aiding a abetting causes of action are the so called "Carlyle Group" affiliated entities and all persons who controlled, directly or indirectly, the actions of PT Cable or the actions of its corporate parents; Neptune Communications, LLC and Neptune Global Systems, LLC, and the Lenders who lent money to PT Cable for the express purpose of being paid out to PT Cable's owners as a dividend.

5. Add an "alter ego" cause of action requesting disregard of entities used as instrumentalities to perpetrate a fraud or injustice upon PT Cable, Neptune Pacific and/or their creditors.

This court is undoubtedly well aware of the liberal standards that apply to requests to amend pleadings. Under the language of the appropriate rule, Fed. R. Civ. Proc. 15, amendment shall be freely given when justice so requires. The Trustee, if allowed to substitute in and intervene as a new party plaintiff, should be permitted to plead his claims and sue the appropriate and necessary parties as his judgment dictates.

The new claims all arise out of the same common facts and circumstances as do the Substitution Causes of Action and the other causes of action asserted by the existing plaintiffs. The Trustee is not seeking to add new claims based on new or different facts or circumstances.

The Trustee is, of course, free to bring new claims in a separate cause of action. However, the court may very well consolidate a new action with this case due to the commonality of operative

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facts and the result would be that same as permitting substitution, intervention and amendment at this juncture.[5]

The defendants cannot demonstrate that they would suffer material prejudice if the court allowed the Trustee to amend as requested. Clearly, it promotes judicial economy and fairness to all of the ultimate litigants that all of the claims arising out of the same facts and circumstances be brought and fully and finally litigated in one action. The relevant factors weigh heavily in favor of granting the Trustee's motion to amend.

III. CONCLUSION

For reasons stated, the Trustee requests that the Court grant this Motion.

Respectfully submitted this 24th day of February, 2006.

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[5] The Trustee reserves his rights to seek a severance of his claims for trial under Fed.R.Civ.Pro. 20(b) and 42(b). The Trustee cannot full assess the pros and cons of being a co-plaintiff along with the existing plaintiffs until he becomes fully ensconced in the case and, therefore, even though intervention in this action appears reasonable now, it is conceivable that severing claims may prove to be prudent.